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E. R. Callister; K. Roger Bean; Attorneys for Respondent;

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In the
Supreme Court of the State of Utah

THE STATE OF UTAH,

Respondent,

vs.

FRANK DELANO GAY, OLIVER
TOWNSEND & WILLIE OLEN
SCOTT,

Appellants.

Case No.
8565

FILED

BRIEF OF RESPONDENT

Clerk, Supreme Court

E. R. CALLISTER,
Attorney General,

K. ROGER BEAN,
Assistant Attorney General,

Attorneys for Respondent.

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In the Supreme Court of the State of Utah

THE STATE OF UTAH,

Respondent,

vs.

FRANK DELANO GAY, OLIVER
TOWNSEND & WILLIE OLEN
SCOTT,

Appellants.

} Case No.
8565

BRIEF OF RESPONDENT

STATEMENT OF FACTS

This is an appeal from convictions of robbery in the Third Judicial District Court and sentences imposed thereon.

Credit Industrial Loan Company in Salt Lake City, was held up on November 28, 1955 and \$465.00 was taken

at gunpoint from the presence of the assistant manager and the cashier on duty (R. 95-98, 116-119). On December 3, 1955, a complaint was signed charging the appellants with that robbery. The appellants Townsend and Scott were arrested near Chandler, Oklahoma on December 4, 1955 and returned to Salt Lake City on or about the 22nd day of December, 1955. The appellant Gay was arrested on December 20, 1955 in Los Angeles and returned in January, 1956 to Salt Lake City. The three were bound over following preliminary hearings and charged in two informations with robbery. After trial on April 10 and 11, 1956, they were convicted as charged and sentenced to the statutory prison term.

STATEMENT OF POINTS

POINT I.

THE TRIAL JUDGE'S BRIEF ABSENCE FROM
THE BENCH WAS NOT PREJUDICIAL.

POINT II.

INABILITY TO REMEMBER ACCURATELY
THE DATE OF AN OCCURRENCE IS NOT
PERJURY.

POINT III.

THE ALLEGED PRIVILEGED CONVERSA-
TIONS WERE NOT PRIVILEGED.

POINT IV.

THE REFERENCES TO MONEY FROM THE
MEMPHIS BOARD OF EDUCATION WERE
NOT ERRONEOUS.

ARGUMENT

POINT I.

THE TRIAL JUDGE'S BRIEF ABSENCE FROM
THE BENCH WAS NOT PREJUDICIAL.

At page 75 of the record the following appears:

“THE COURT: Mr. Anderson, would you excuse me. I believe there is a man that is wanting to see me and I will see if I can take care of it. You may proceed.”

The record then shows ten questions and answers running onto the following page, at which point the Court admonished the witness to keep his voice up. From the amount of testimony taken between the two statements by the Court, it is certain that the Judge was gone not over two minutes and it could have been any shorter period. During that brief moment counsel for appellants were present and the record reflects no irregularity in the proceedings. The Judge did not lose control of the trial. Consequently there was no prejudice to the appellants resulting from his short absence and they are therefore not entitled to reversal on this ground. Section 77-42-1, U. C. A. 1953; *Tucker v. State* (Ark. 1937), 108 S. W. 2d 890.

POINT II.

INABILITY TO REMEMBER ACCURATELY
THE DATE OF AN OCCURRENCE IS NOT
PERJURY.

Mr. Christensen was Assistant Manager of the victimized loan company. On direct examination he testified that after the robbery, Detective Duncombe showed him some pictures of colored persons and that he identified the three appellants as the stick-up men (R. 97). He was then asked about two lineups held for identification purposes and he obviously could not remember the correct date of the first one. At R. 99 the record shows:

“Q. And subsequent to that time, Mr. Christensen, did you have occasion to observe a lineup?

“A. Yes.

“Q. And when was that?

“A. That was a couple of days after the robbery. I don’t remember the exact date.

“Q. You don’t remember the date?

“A. No. I believe it was about the second; no, it couldn’t have been the second, the second day after. It was around the 18th or 20th. Well, it was about two days after the robbery.

“Q. Well, this occurred on the 28th, did it not?

“A. It was around the 30th, or something like that.

“Q. So that the lineup was after, two or three more days after that?

“A. Yes, uh huh.”

Mr. Christensen's confusion was not lost on defense counsel. On cross-examination Mr. Hatch promptly took up the matter of the first lineup and returned to it to exploit the witness's uncertainty as to the date (R. 101, 106).

Detective Duncombe testified that he showed pictures to Mr. Christensen a few days after the holdup and that Christensen picked the three appellants from the group (R. 129). He further stated that there were no lineups of living persons until the afternoon of December 22, 1955, which is about three weeks later than the date fixed by Christensen.

Whether Christensen confused the date of the lineup with the date he saw the appellants' pictures, or just couldn't remember, is immaterial. In either event such a lapse of memory is normal. The accuracy of his recollection ran to his credibility, and that was a matter for the jury's consideration. The appellants cannot complain on appeal that the jury exercised its prerogative of judging the credibility of a witness.

Appellants state in their brief that because of contradictory testimony of the witnesses in this case it is apparent that someone committed perjury. We agree with this analysis and submit that the jury by its verdict cast the shadow of suspicion elsewhere than on the State's witnesses.

POINT III.

THE ALLEGED PRIVILEGED CONVERSATIONS WERE NOT PRIVILEGED.

On January 28, 1956, prior to trial of this case, the District Attorney was served with a "Notice of Defense of Alibi" (R. 11). Part of the Notice stated:

"That on the 28th day of November, 1955, they were in the State of Oklahoma at the farm of the grandparents of Willie Olen Scott immediately outside the town of Meeker, Oklahoma."

At the trial, on both direct and cross examination, appellant Scott testified that on November 28, 1955, he was at his mother's place (R. 175-178). The District Attorney asked Scott whether he had given his attorneys information about his whereabouts on November 28, 1955, the date of the robbery. Assuming that the substance of any conversations with his attorneys on this point was privileged, the question was sufficiently broad that it could have been answered yes or no without infringing on the privilege. But the subject matter of the question was not privileged because it was not intended to be confidential. It was intended to be communicated to the District Attorney as part of the Notice of Defense of Alibi and to be advanced at the trial as the foundation of the appellants' defense. Consequently it comes within the rule that attorney-client communications not intended by the client to be confidential are not privileged. 58 Am. Jur., Witnesses, Sec. 490 states in part:

"However, in order that the rule as to privileged communications between attorney and client or its reason shall apply, it is necessary that the communication by the client to the attorney or his clerk be confidential, and be intended as confidential. The communication must be made in confidence for the purposes of the relation of attorney and client. If

it appears by extraneous evidence, or from the nature of the transaction or communication, that confidence was not contemplated and that the communication was not regarded as confidential, then testimony of the attorney or client may be compelled."

The decisions in *City and County of San Francisco v. Superior Court*, (Calif. 1951), 231 P. 2d 26, 30; *Brown v. St. Paul City Railway Co.*, (Minn. 1954), 62 N. W. 2d 688, 700, and *Berkowitz v. Tyderko, Ltd.*, (Cal. App. 1936), 57 P. 2d 173 are to the same effect.

POINT IV.

THE REFERENCES TO MONEY FROM THE MEMPHIS BOARD OF EDUCATION WERE NOT ERRONEOUS.

The appellants' defense was that prior to, on the date of, and subsequent to the robbery charged, they were in Oklahoma and Tennessee. On cross examination the District Attorney asked appellant Scott whether, while in Memphis, he had visited the Board of Education with Townsend (R. 193, 194). He answered in the negative. In cross examining appellant Townsend, the District Attorney asked whether some wrapped rolls of silver he had been carrying had "Memphis Board of Education" on them (R. 229). He answered that he had won the money gambling and didn't know what it had on it. The District Attorney also asked appellant Gay if he had visited the Board of Education while in Memphis (R. 245). Defense counsel moved for a mis-trial and the Court ruled that the question was imma-

terial but denied the motion for mis-trial. The matter was then dropped.

The purpose of these questions does not appear; the District Attorney could have been searching for a weakness in the testimony of the appellants which he was not able to pursue. At any rate there is nothing in the questions or in the answers elicited to prejudice the appellants in any way and the same information was testified to without objection by Mr. Hunter of the Oklahoma State Crime Bureau (R. 252). There was no reference to another crime as appellants argue in their brief, and anything of that nature which might have been inferred by the jury would have fallen far short of the affirmative statement of Mr. Hunter, on cross examination by defense counsel, to the effect that the appellants had been under surveillance and had been suspected of certain burglaries prior to their arrest for the offense charged (R. 260-262).

CONCLUSION

The appellants have raised many points which we feel are patently without merit and which consequently are not discussed here. The questions they raise were questions for the jury. The trouble is, the jury who observed the appellants and their witness chose to disbelieve them and believed instead the witnesses for the State. Having lost the battle below by unanimous decision, they now seek a re-match. This they are not entitled to. The judgment below should be affirmed.

Respectfully submitted,

E. R. CALLISTER,
Attorney General,

K. ROGER BEAN,
Assistant Attorney General,

Attorneys for Respondent.

